OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-04 April 4, 2007

TO: All Division Heads, Regional Directors, Officers-in-Charge and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Midwinter Meeting of the Practice and Procedure Committee (P & P Committee of the Labor and Employment Relations Section of the American Bar Association – March 2007

The Board and I attended the Annual Midwinter meeting of the P & P Committee from March 6 through March 10. A primary purpose of this meeting was to discuss and respond to Committee concerns and questions about Agency casehandling processes. At this meeting I provided responses to questions that the Committee had submitted earlier in the year. It is important that you and your staffs be aware of the concerns of the organized bar at the National level and of my thinking on these issues. Accordingly, I am sharing my responses with you.

As with my first meeting with the P & P Committee in 2006, I was very impressed and gratified by the comments of the practitioners at the meeting concerning the professionalism and dedication of the Agency staff with whom they regularly deal. My experiences with you as well as my interactions with the bar, continue to reinforce the high level of respect I hold for you and your staffs. Thank you all for all of your fine efforts.

The attached summarizes our responses to the Committee.

/s/
R.M.

Attachment
cc: NLRBU
Release to the Public

How does the General Counsel define "full and complete cooperation by a charging party?" Does it include the presentation of a witness for interview by Board Agents without subsequent execution of an affidavit?

With respect to cooperation required of charging parties, Casehandling Manual Section 10054.1(a) provides:

> It is the responsibility of the charging party to comply with the Board agent's requests to:
>
> - Identify the conduct claimed to be violative of the Act
> - Meet with the Board agent at a reasonable time and place
> - Fully cooperate in the preparation of an affidavit(s) by a Board agent
> - Provide all relevant documents within its possession
> - Comply with all other reasonable requests necessary to complete the investigation
>
> In addition, <u>institutional</u> charging parties are responsible for presenting all witnesses <u>within their control</u> to the Board agent for the purpose of taking affidavits. However, if, despite reasonable and diligent efforts, the charging party is unable to present witnesses who possess relevant evidence, the Board agent should independently contact such witnesses, with the assistance of the charging party, where possible. (Emphasis added).

Thus, when individual charging parties are unable to present witnesses to the Board agent for the purpose of taking an affidavit, this inability is not considered a lack of cooperation. This is also true when an institutional charging party is unable to present witnesses for a Board prepared affidavit.

Does the General Counsel make a distinction between an "affidavit" from a witness and a "declaration"? If so, what is the distinction with regard to EAJA, credibility or any other impact of the investigation?

The General Counsel does make a distinction between an affidavit prepared by a Board agent and a "declaration" or affidavit not prepared by a Board agent. As stated in Casehandling Manual Section 10060 and 10060.1:

> The face-to-face affidavit taken by a Board agent is the "keystone" of the investigation and is the preferred method of taking evidence from witnesses, particularly in category II and III cases.

* * *

> Except in category I cases or other situations determined appropriate by Regional management, when affidavits or statements have been prepared and submitted by non-Board personnel (e.g., by the charging party), the witnesses should be re-interviewed on all pertinent points; they should not be asked merely to re-swear to the accuracy of the previously submitted materials.

With respect to the EAJA implications of a declaration by charged party witnesses, Casehandling Manual Section 10054.5(a) defines cooperation as follows:

> It is Agency policy that full and complete cooperation, as that term is used in EAJA litigation, from a charged party includes, where relevant, timely providing all material witnesses under its control to a Board agent so that the witnesses' statements can be reduced to affidavit form and providing all relevant documentary evidence requested by the Board agent. <u>The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation.</u>

Is there a policy regarding how changes are made to an affidavit? Some Board Agents made handwritten changes on a printed affidavit; others input changes into the computer so that changes are not recorded on the documents. How are changes treated when made after an affiant has exited an interview? Before execution? After execution? What is the preferred format? Does the Agency accept non-Board Agent verification, e.g., by a Notary Public? How are changes, in various forms, treated by the General Counsel regarding EAJA, credibility and other aspects of the investigation?

Board agents may either make handwritten changes on a printed affidavit or to input changes into the computer so that changes are not recorded on the documents. Casehandling Manual Section 10060.6 states, in relevant part:

> When completed, the witness should read the affidavit or, if necessary, the Board agent or other individual should read the affidavit to the witness. The witness should be encouraged to make or point out any necessary corrections and should initial each page and each correction and sign the affidavit.

Affiants are expected to execute the Board prepared affidavit prior to leaving the interview. When requested, we have permitted the affiant to discuss the affidavit with his/her attorney by telephone prior to execution of the affidavit. If the affiant leaves and later executes the affidavit, it will be accepted. However, if significant changes have been made to the affidavit as initially drafted by the Board agent, we may require the charging party affiant to submit to another Board prepared

affidavit. In any event, if the affiant wants to revise an executed affidavit, a supplemental affidavit is necessary.

As stated in Casehandling Manual Section 10060.1:

> Except in category I cases or other situations determined appropriate by Regional management, when affidavits or statements have been prepared and submitted by non-Board personnel (e.g., by the charging party), the witnesses should be re-interviewed on all pertinent points; they should not be asked merely to re-swear to the accuracy of the previously submitted materials.

With respect to charged party witnesses, the submission of affidavits not taken by a Board agent, although accepted by the General Counsel, does not constitute full and complete cooperation.

Based upon all the evidence obtained during the investigation, the Regional Office will decide whether the charge is meritorious. In assessing the evidence, greater weight is given to evidence that is contained in a Board prepared affidavit than is given to evidence presented in another form, such as a declaration. Moreover, major changes to an affidavit may also be considered as part of the Regional Office's assessment of all of the evidence.

What is the Board's policy on allowing trial testimony by video conference? If allowed, under what circumstances and how are exhibits handled?

The Board's policy with regard to the receipt of testimony via videoconference is evolving. Board precedent for many years was that Rule 102.30 of the Board's Rules and Regulations expresses a preference for live oral testimony which the Board construed as a requirement that the witness be physically present in the hearing for oral examination. *Westside Painting Inc.,* 328 NLRB 796 (1999). While *Westside Painting* involved the taking of telephone testimony, the Board stated "…if a witness is not available to testify at the hearing there is one, and only one, alternative method of securing his testimony: by deposition." However, in late 2002 and early 2003, the Board in an unpublished decision considered the General Counsel's interlocutory appeal in *Palace Arena Football, LCC a/d/a Detroit Fury*, Case 7-CA-45132 to the ALJ's order allowing the use of videoconference to obtain the testimony of a witness who was unwilling to appear in person. The witness indicated that he would voluntarily testify in the Board hearing if it were held in Tampa on certain days. The hearing was located in Detroit. The Board found that the ALJ did not abuse his discretion by directing that the witness's testimony be taken by videoconference. It noted that *Westside Painting* addressed the sole issue of telephonic testimony, which does not allow the judge to observe the witness's demeanor, or to guard against potential misconduct, such as coaching of the witness or the witness's use of prepared statements or other

documents. The Board noted that these significant concerns do not exist with video testimony.

There is a committee of Agency representatives reviewing the potential use of video testimony in Representation case proceedings.

When blocking charges are filed, is there a procedure or policy to request the Charging Party provide a letter containing a list of witnesses and a short explanation of the expected testimony before blocking of an election? If so, are there any circumstances under which such a letter would be disclosed, e.g., pursuant to a FOIA request?

A blocking charge is a priority investigation and a Regional Office may request that the Charging Party provide, within a reasonable time frame, the names, addresses and telephone numbers of its witnesses and short summaries of their anticipated testimony. See Sections 11730-11734 of the Board's Representation and Unfair Labor Practice Casehandling Manuals for a more detailed discussion about the investigation of blocking charges.

Under FOIA Exemption 7(A), materials maintained in an open investigative file are protected from disclosure to the extent that release would compromise our enforcement proceedings. Moreover, in closed cases FOIA Exemptions 6 and 7(C) protect the personal privacy interests of individuals in most files. Therefore, such a letter would not be disclosed pursuant to a FOIA request.

Section 10(j) Matters

What is the General Counsel's view regarding relief under Section 10(j) pursuant to the "First Contract" initiative?

In GC Memorandum 06-05, "First Contract Bargaining Cases," April 19, 2006, the General Counsel initiated a policy that, in cases where unfair labor practices interfere with bargaining for a first labor contract, Regional Offices should consider, in addition to special remedies as part of the Board's order, Section 10(j) injunction proceedings in order to protect these new bargaining relationships. The Section 10(j) program is particularly well positioned to promote effective initial contract bargaining. If employees must wait for a Board order to remedy violations committed after employees have freely chosen union representation, their choice will likely be undermined. The use of Section 10(j) proceedings in these types of cases is supported by court decisions that have long recognized the need for interim relief to protect the representational choice of employees.

From the time charge is filed, what is the average median time it takes the Region to (a) investigate, and (b) recommend and transfer the case to Advice?

In Fiscal Year 2006, the median number of days taken by Regional Offices to investigate Section 10(j) cases and to submit those cases to the Injunction Litigation Branch was 134 days from the filing of the initial charge to receipt of the Regional Offices' memoranda by the Injunction Litigation Branch. Section 10(j) cases typically involve multiple charges, and the number of days is calculated from the filing of the first charge. In addition, the Fiscal Year 2006 was also affected by 10(j) cases filed after the ALJD.

How often has the General Counsel sought Section 10(j) injunctions in either (a) organizing campaigns; or (b) first contract negotiations?

a) In Fiscal Year 2006, the General Counsel sought Section 10(j) injunctions in 7 organizing cases, which includes 5 organizing cases that did not involve Gissel bargaining orders and 2 cases that did.

b) In Fiscal Year 2006, the General Counsel sought Section 10(j) injunctions in 6 first contract bargaining cases.

Is it possible to list on the Board's website the status of cases in which (a) Section 10(j) relief has been authorized, and (b) where the Board has sought contempt?

This information was initially to be included in the Electronic Case Information System (ECIS) as part of the new "My NLRB" component of the Board's website. The Agency is actively working to include this information on the website, and we hope to provide it in the near future.

In how many 10(j) cases has the Board sought contempt this year, and what were the bases for seeking contempt?

In Fiscal Year 2007 to date, one contempt petition has been authorized by not yet filed. The basis for contempt in that case is Respondent's failure to properly reinstate the discriminatee.

Investigative Subpoenas: What is the Board's policy for having a court reporter record the testimony of a witness who has been served with an investigative subpoena? If the testimony is recorded (and) the witnesses' or party's counsel is present, can counsel question the witness?

There is no strict Board policy governing whether to utilize a deposition format rather than affidavit when questioning a witness who is responding to an investigative subpoena. The issue turns on the Region's assessment of which method will allow it to best obtain the information necessary for an informed determination of the issues presented. By way of example, a deposition format may be appropriate where a Region expects, based on its experience or assessment, that a witness will be hostile or

evasive in responding to questions or where an uncooperative witness is expected to refuse to review or sign his or her affidavit.

While, counsel can, of course, be present at the deposition, there is no right for a witnesses' or party's counsel to question the witness at a deposition conducted in response to an investigative subpoena. A Region has the discretion to allow such questioning if it determines that it would enhance the investigatory process.

Are there uniform standards for the issuance of investigative subpoenas? If so, are those standards public? How many have been issued in the last year? How many have proceeded to enforcement? How many investigative subpoenas issued in cases where merit determinations were ultimately made?

As stated in the Agency's Casehandling Manual for Unfair Labor Practice Proceedings, in Section 11770, investigative subpoenas should be utilized responsibly to make available to the Regional Director evidence necessary for:

- Deciding whether a complaint or compliance specification should issue, absent settlement

- Determining whether there has been compliance with remedial obligations or

- Making appropriate determinations in processing R cases

Section 11770.2 further provides that a Regional Director has full discretion to utilize investigative subpoenas …."whenever the evidence sought would materially aid in the determinations described above in Sec. 11770 and whenever such evidence cannot be obtained by reasonable voluntary means."

From information provided by the Regions, during Fiscal Year 2006 investigative subpoenas were utilized in 481 cases. A total of 1,090 subpoenas were issued in these cases, yielding an average of about 2.2 subpoenas per case. During the year there were a total of 23,080 of charges filed in C cases. Thus, investigative subpoenas were utilized in approximately 2.1% of the cases.

Regions reached merit determinations in 394 of the cases where investigative subpoenas issued. In those cases, Regions determined that there was merit, in whole or in part, in 224 cases (57%). This compares with the overall merit factor of 37%.

During Fiscal Year 2006 the Agency filed for court enforcement of investigative subpoenas in 24 cases. In these cases, the Agency prevailed in 13 cases and one other case was pending at the close of the fiscal year. In the other 10 cases the matter was resolved without the need of a court decision.

Deferral of Cases

Scope of investigation of Cases Deferred Under Collyer: In the Committees' experience, some Regions conduct a full investigation, some a partial investigation and some no investigation in deferred cases. Is this disparity of practice consistent with General Counsel Guidance?

The General Counsel adheres to the Board's longstanding policy set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp*., 268 NLRB 557(1984) that deferral is appropriate if the charge is arguably meritorious, the conduct in issue is cognizable under the grievance procedure, the grievance procedure culminates in final and binding arbitration and the charged party waives all timeliness defenses to the grievance. The level of investigation required to confirm each of these elements may vary. Where, the facts are not in dispute and after a brief exchange of information with the parties, the Regional Office can confirm the case is appropriately deferred, and a partial or limited investigation will suffice. However, Regional investigators often encounter a different group of cases, situations where the charge might, on its face, allege an arguable violation of the law, but which may, after full investigation be found not to be meritorious. In those cases, it might be appropriate for a Regional Office to conduct a full investigation to bring a determinative disposition to the affected parities.

Thus, in some cases, the necessary elements may be confirmed with minimal investigation, thereby allowing Agency resources to be directed to other matters. In others, it would be appropriate to conduct a full investigation. However, in each case, it is the responsibility of the Board Agent to collect the necessary information to enable the Region to make a reasoned determination of whether there is "arguable merit" in the case.

Has the backlog of cases deferred to arbitration been reduced? Is this a problem on a national basis?

The inventory of deferred cases has been reduced dramatically during the past 5 years. The Regions have implemented effective monitoring systems to ensure these cases receive timely attention.

In 2002, we began an initiative to develop systems and strategies to address the growing inventory of cases pending deferral under *Collyer Insulated Wire,* 192 NLRB 837 (1971). The first phase of this program focused on cases pending *Collyer* deferral for more than 5 years. This first effort removed 592 of the oldest cases from the deferral inventory. The second stage of this *Collyer* initiative targeted cases deferred for at least three years. Of the 1178 cases pending for more than three years, the Regional Offices were able to close 822.

In OM 04-52 and OM 05-24, the Regions were asked to survey and take appropriate actions in *Collyer* cases pending for at least two years. During these survey periods,

the Regions were again able to successfully and meaningfully reduce the overall inventory of *Collyer* deferred cases. In Fiscal Year 2004, of the 1260 cases in this category, the Regions dismissed or approved withdrawal in 717 instances, leaving 413 cases pending either in *Collyer* deferral, or under *Speilberg* review or continued processing on the merits of the allegations. In Fiscal Year 2005 the Regions had similar success. They closed 1,242 of the 1779 cases placed in *Collyer* deferral in or before 2003.

Most recently, in OM 06-63, the focus was on deferral cases pending for one year of more. At the beginning of May 2006, there were 1324 cases pending deferral for more than one year. The Regions were able to close 631 of these cases.

In conjunction with participation in the annual surveys, Regions have implemented regular systems to monitor the status of all deferred cases. As set forth in the case-handling manual, Regions now routinely require the parties to provide information regarding the status of the deferred cases every 90 days. Regional decisions to continue to hold cases in deferral or to resume processing are made based on the responses or lack of responses to these inquiries.

The ever-improving results establish that the Regions are now managing their inventories of deferred cases effectively. In Fiscal Year 2002, when we began our initiative with respect to the *Collyer* backlog, there were 4526 cases pending *Collyer* deferral. The current inventory of all *Collyer* deferrals is 2379. Of these cases, 304 have been pending for more than 3 years - a nearly 75% reduction in this category of cases since 2003.

Non-Board Settlements

Are there any published or unpublished memoranda or guidelines from the General Counsel defining the circumstances under which a non-Board settlement will or will not be approved?

On December 27, 2006 we issued OM Memorandum 07-27, “Non-Board Settlements,” which sets forth the applicable standards that Regions should follow in deciding whether to approve a withdrawal request based on a non-Board settlement reached between the parties in a case. This memorandum was released to the public and is available on the Agency’s website.

Does the General Counsel require that discriminatees receive eighty (80%) percent backpay for non-Board settlement?

The General Counsel’s 80% settlement guidelines apply to all types of settlements: informal, formal and non-Board settlements. Regional Directors may seek approval from the Division of Operations-Management to approve settlements in which discriminatees receive less than 80% backpay and interest in circumstances where the approval of a settlement that departs from the General Counsel’s guidelines would,

nevertheless, effectuate the purposes of the Act because of the particular extenuating circumstances of that case.

Are there different standards for accepting settlements in the enforcement phase of litigation?

The General Counsel's general standards for the approval of settlements remain the same in the enforcement phase of litigation. However, after having obtained a Board order, the General Counsel is seeking to obtain compliance with the terms of that order and the inherent risks in the litigation have been substantially reduced. Therefore, a Regional Director may be unwilling to approve the terms of a settlement that would have been acceptable prior to obtaining a Board order.

Is there any standard criteria by which the strengths or weaknesses of a complaint issued by a Regional Director is judged in evaluating whether to accept a non-Board settlement?

In *Independent Stave Co.*, 287 NLRB 740 (1987), the Board identified a list of factors to be considered in passing on non-Board settlements: (1) whether the settlement is reasonable in light of the alleged violation, the risks if litigating the issue, and the stage of litigation; (2) whether the charging party, the respondent and the discriminatees have agreed to be bound, and the General Counsel's position regarding the settlement; (3) whether fraud, coercion or duress were present; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. Id. at 743.

POST ISSUANCE OF COMPLAINT/POST HEARING

Following the issuance of a complaint, what is the average/median time for a hearing to be held?

In Fiscal Year 2006, the median time from the issuance of a complaint to the opening of an unfair labor practice hearing is 84 days.

Representation Cases: What have been the experiences with the traditional and full Consent Election agreements?

On January 25, 2005 the Board published in the Federal Register final revisions to Parts 101 and 102 of its Rules and Regulations. These revisions include a new Section 102.62(c), which provides a third election agreement option for parties to a representation case. New Section 102.62(c) provides the parties with the opportunity to enter into a voluntary agreement to have the Regional Director conduct a hearing and thereafter resolve with finality all pre-election factual and legal disputes. The parties thereby waive their rights to file a request for review of the Regional Director's decision to the Board. The revised Rules are available on both the NLRB Internet Website and the Agency Intranet.

Under the new procedure, as with the traditional consent agreement under Section 102.62(a), all post election disputes – challenges and objections – would likewise be decided by the Regional Director with no right of appeal to the Board. The Regional Director would investigate those matters either administratively or through a hearing and issue a report setting forth his/her findings, which would be final and binding. The aim of the new subsection is to provide our customers with an option for a quick and fair election with prompt resolution of both pre- and post-election disputes through the expert and impartial application of representation law by means of binding decisions by a Regional Director.

The new procedure was formally rolled out to the Regions by Memorandum OM 05-40 on March 21, 2005. This memorandum was released to the public and posted on the Agency Website. Notwithstanding our best efforts to familiarize the Bar and the parties with the advantages of the procedure, including savings in time and costs, only one "full" consent election has been conducted since the procedure was introduced.

While the parties have not yet embraced the "full" consent procedure, the introduction of the new procedure appears to have sparked new interest in the traditional consent election procedure. In Fiscal Year 2005, 86% of 2668 initial elections were held pursuant to election agreements. Ninety-three of these election agreements were traditional consent elections. Similarly, in Fiscal Year 2006, 88.3% of 1,937 initial elections conducted by the Regions were pursuant to election agreements. Eighty-eight of these were traditional consent election agreements. This recent experience represents a substantial increase over past years when generally only a handful of elections were conducted pursuant to consent agreements.

What are the current statistics of R case time targets?

The Agency's goal under the Government Performance and Results Act (GPRA) objective is to conduct initial elections within 42 days from the filing of the petition. The other GPRA goal governing the conduct of initial elections is to conduct 90 percent of the elections within 56 days. In Fiscal Year 2006, we exceeded these goals, conducting initial elections in a median of 38 days, with 94.2 percent of all elections conducted within 56 days. This compares to a 39-day election median and 93.6 percent of all elections conducted within 56 days in Fiscal Year 2005.

In terms of our post-election GPRA goals, the Agency's objective is to conduct all post-election investigations of objections and challenges in a median of 35 days and in those cases where a hearing is necessary to issue a report in a median of 90 days. In Fiscal Year 2006 the Regions issued post-election (no-hearing) reports in a median of 22 days and post-election hearing reports in a median of 71 days. This compares to a 23 day median in no-hearing cases and a 71 day median in hearing cases in Fiscal Year 2005.

What is the policy for using interns/law students/externs (or anyone other than a Board agent) to conduct an election? What type of training/supervision do they receive?

When funding is available, the Agency may employ paid law students as interns in Regional Offices during the summer. Regional Offices also have arrangements with local academic institutions to provide non-paid work experiences for both graduate and undergraduate level students and law students. These individuals are usually referred to as externs or student volunteers. Externs may or may not receive academic credit for their work experiences depending upon the institution in which they are enrolled.

At the discretion of Regional Office management, both interns and externs may be assigned to assist Board Agents with conducting elections. When they assist with an election, they are supervised by an experienced Board Agent. Depending upon the development and performance of the interns during their work periods, and the other assignments they are given, paid interns may conduct elections independently. This usually occurs when there is adequate time and opportunity during the work term for the intern to be fully trained to conduct elections.

Some Regional Offices also utilize Election Examiners (WAE) on an as needed basis or support staff employees, such as Election Assistants, who are trained in election procedures, to conduct elections.

Note that because we are interested in what prompted this question we asked if there had been any problems with the use of interns or law students to conduct elections? There was no response.

How are the Regions handling decertification cases involving recognition agreements in light of the cases currently pending before the Board?

OM Memorandum 04-76, "Casehandling Instructions Regarding Cases Involving Card Check and Neutrality Agreements," dated July 29, 2004, instructs Regions to consult with the Executive Secretary's Office regarding whether the recognition bar doctrine should bar the processing of a decertification petition filed after recognition was granted pursuant to a recognition agreement. Regional Offices continue to follow outstanding Board law concerning whether a "reasonable" period of time for bargaining has occurred such that a union's majority status is irrebuttably presumed and the processing of the decertification petition barred.

Oakwood Related Issues: Can UC petitions be entertained mid contract or otherwise, in light of Oakwood? Is a General Counsel memo likely to issue on this subject? What is the "scope of evidence" of changed circumstances that will be considered relevant in cases remanded following Oakwood? Will the Regions be taking new evidence on alleged charges and circumstances or facts relating to the supervisory issue or will they make the decision by applying the Oakwood test to the facts as they existed at the time of the hearing?

There has been no change in the procedures Regional Directors follow when processing UC Petitions raising *Oakwood Healthcare* issues. UC Petitions are processed in accordance with established casehandling procedures (see Case-Handling Manual II, §§11490-11498). The General Counsel does anticipate issuing a Guideline *Oakwood* memorandum.

The parties to remanded "Oakwood" cases may request the record be reopened for the purposes of receiving evidence of "changed circumstances." Generally, the scope of this evidence includes changes in the duties and requirements of the job classification(s) at issue, which occurred while the case was pending before the Board.

The Regional Directors will base decisions regarding the supervisory status of disputed job classifications based upon current working conditions. As necessary, the Regional Directors will reopen hearings to receive additional evidence regarding the current circumstances of the disputed job classifications.